Before the
Federal Communications Commission
Washington, D. C. 20554

FCC 83-394
33741

In the Matter of	)	
Inquiry into Enforcement of Prohibitions Against The Use of Common Carriers For the Transmission of Obscene Materials	)	GEN Docket No. 83-989

NOTICE OF INQUIRY

Adopted: *September 9, 1983* ; Released: *September 16, 1983*

By the Commission:

1. The Commission is instituting this general inquiry into enforcement of prohibitions against the use of common carrier facilities for the transmission of obscene materials. We will focus on two issues: The first is what the Commission's role should be in enforcing the prohibition in section 223 of the Communications Act of 1934, 47 U.S.C. § 223, against making any statement over the telephone that is "obscene, lewd, lascivious, filthy or indecent." Our inquiry into this first issue is two-fold: first, whether the Commission has the authority to determine if material is obscene; and, second, in the event we conclude that we do have the authority, whether it is necessary, desirable or appropriate for the Commission to make an obscenity determination and take action to stop the offensive activity. The second major issue on which we shall focus is whether common carriers may unilaterally determine that materials are obscene and terminate service or exclude the obscene materials, when transmission of obscene materials is prohibited by statute, tariff or contract. Common carriers in such a position could include not only those providing telephone communications, but those providing other services as well, such as licensees in the multipoint distribution services (MDS).

2. The Commission has recently been called upon to address both of these issues, by virtue of two filings we have received. One is a complaint against a "dial-a-porn" telephone recorded message-service (File No. E 83-14); the other is a request for a declaratory ruling by an MDS carrier seeking to enforce its contract prohibiting unrated or X-rated movies on its channel (File No. CCB DFD 83-2). These petitions are described in more detail below. Although the Commission could proceed independently in each of these cases and make the necessary determinations therein, we have chosen instead to defer action on these pending resolution of this docket. We do so in order to analyze more fully and carefully the obscenity problem.

3. We believe public comment is particularily desirable because of the concerns which are in conflict. On the one side is the concern of parents and congressmen that teenagers and pre-teenagers may have access to obscene recordings and movies. On the other side is the deeply rooted first amendment principle of freedom of speech. Numerous sub-issues and questions are raised by the larger issues. Through this Notice, we intend to give attention to all pertinent issues, so that we can make well-informed, reasoned decisions in exercising discretion under pertinent statutes. We note, moreover, that the activities complained of in the two cases before the Commission are not isolated. Recorded message services depicting or describing sexual activities appear to be proliferating, thus heightening the concerns of parents and elected representatives. Similarly, the issue raised by the MDS petition — the ability of a common carrier to unilaterally enforce prohibitions against obscenity — is likely to recur. Accordingly, we have concluded that a comprehensive inquiry into the issues at hand is warranted.

ISSUE 1: Scope of Commission's Enforcement Powers Under Section 223 and Advisability of Excercising That Power

A. Statutory Framework

4. Section 223 of the Communications Act subjects anyone who uses the telephone to make comments or statements that are "obscene, lewd, lascivious, filthy or indecent" or who knowingly permits the use of a telephone under his control for a use prohibited by the statute to a fine of up to $500 and imprisonment of up to six months. 1/

1/ Section 223 provides in pertinent part:

Whoever -

(1) in the District of Columbia or in interstate or foreign communication by means of telephone -

(A) makes any comment, request, suggestion or proposal which is obscene, lewd, lascivious, filthy, or indecent; [or]

* * *

(2) knowingly permits any telephone under his control to be used for any purpose prohibited by this section,

shall be fined not more than $500 or imprisoned not more than six months, or both.

B. History of Dial-A-Porn Controversy

5. On March 31, 1983, Peter F. Cohalan, individually and in his capacity as County Executive of Suffolk County, New York, filed a formal complaint with the Commission, pursuant to section 208 of the Act, 47 U.S.C. § 208, against New York Telephone Company. 2/ The essence of the complaint is that New York Telephone has violated section 223 of the Act by allowing one of its "Dial-It" services 3/ to be used by High Society Magazine, Inc. for recordings that depict or describe sexual activity.

6. It appears from the pleadings that High Society Magazine, Inc. and Car-Bon Publishers obtained the Dial-It number in a lottery for Dial-It numbers conducted by New York Telephone in January, 1983. The number was thereafter advertised in "High Society Live!" magazine and, in February 1983, operation of the service commenced. When the number is dialed, the caller hears a description or depiction of actual or simulated sexual behavior. The messages, which are changed at least once daily, are available to any caller, twenty-four hours a day, every day. As the local common carrier, New York Telephone does not operate the message service but provides the Dial-It service capability pursuant to an intrastate tariff filed with the Public Service Commission of New York. 4/ That tariff, which applies to all New York Telephone Dial-It services, explicitly provides that the subscriber has exclusive control over the content and quality of the messages recorded and that the telephone company assumes no liability therefor. 5/

7. The Dial-It number operated by High Society has apparently been widely disseminated and called. Sources calculate that the service receives up to 500,000 calls a day, 6/ yielding approximately $10,000 for High Society

2/ Mr. Cohalan had previously filed a complaint in a New York State Supreme Court, in which he sought a preliminary injunction to block availability of the service to Suffolk County residents. His suit named High Society, Car-Bon Publishers, New York Telephone and this Commission as defendants. After removal to federal court, the Commission was dismissed as a defendant for lack of subject matter jurisdiction. The suit was later dismissed in its entirety for lack of federal jurisdiction. Memorandum and Order, CV 83-0603 (E.D.N.Y. 1983). Mr. Cohalan then filed complaints with the Commission and the New York State Public Service Commission.

3/ A Dial-It service permits up to 50,000 callers per hour to hear a pre-recorded message, thereby making a busy signal unlikely.

4/ New York Telephone P.S.C. Tariff No. 900.

5/ Id., § 13 at 24.

6/ Affidavit of Lawrence E. Abelman, attorney for High Society, in Opposition to Plaintiff's Application for Preliminary Injunction, CV 83-0603 (E.D.N.Y. 1983) at 3.

and $35,000 for New York Telephone per day before costs. 7/ It has been asserted that 20% of these calls are interstate. Teenagers and pre-teenagers are evidently among those who have been dialing the number. 8/ This is of particular concern to parents because, except to the extent the calls are made from the house and are long-distance, access is difficult to detect and control. Access to this service by children has similarly alarmed many congressmen. On May 6, 1983, forty-six congressmen sent a letter to Chairman Fowler expressing their concern and urging that the dial-a-porn service be stopped.

8. New York Telephone moved to dismiss the complaint filed against it with the Commission, on the ground that section 223 was only intended to prohibit the making or placing of telephone calls to innocent victims and hence would not apply to a situation where the calling party subjects himself voluntarily to hearing the receiving party's message. 9/ U.S. Representative Thomas J. Bliley of Virginia filed comments opposing New York Telephone's motion to dismiss and supporting Cohalan's complaint. Representative Bliley argued that section 223(1)(A) proscribes transmissions based on content without regard to the source of the transmission, in contrast to other subsections which explicitly apply only to those who make a telephone call. 10/

9. On May 16, 1983, the Common Carrier Bureau dismissed Cohalan's complaint without prejudice and referred the matter to the Department of Justice. The Bureau explained that section 223 provides criminal sanctions and, consequently, that possible violations are customarily referred to the Department of Justice. 11/ Mr. Cohalan and Mr. Bliley have both petitioned for review of the dismissal order. Following a meeting between Commission and

7/ Pursuant to the local tariff for Dial-It services, prior to May 1983 High Society received 2¢ for each local call while New York Telephone received 7¢ (of which 6.96¢ is estimated as New York Telephone's cost). As of May 1983, High Society continued to receive 2¢ per call, but New Telephone's revenue per local call increased to 13¢ (and its average cost to 11.4¢). See New York Telephone P.S.C. Tariff No. 900, § 13 at 25. High Society also receives 2¢ for each long distance call. The long distance carriers and local carriers divide the remaining long distance revenues.

8/ See, e.g., Gilgoff, "Phone Ad Makes Ears Burn", Newsday (February 8, 1983); Levey, "A Garbage Call Should Trigger a Separate Check," Washington Post (June 16, 1983).

9/ Motion to Dismiss, File E 83-14 (April 19, 1983) at 2.

10/ Comments in Support of Complaint, File E 83-14. Representative Bliley has also introduced an amendment to section 223 that clarifies that the statute is applicable to the provider of Dial-It services. H.R. 2755, 98th Congress. (The amendment leaves ambiguous, however, whether the statute covers a common carrier.) The amendment also increases the fine to $50,000 and gives the Commission authority to seek civil fines and the Commission and Attorney General authority to seek injunctive relief.

11/ Memorandum Opinion and Order, File E 83-14 (May 16, 1983) at 3.

Department of Justice attorneys, the Department of Justice has informally responded that it believes administrative remedies would be more appropriate in the first instance. 12/

C. Areas Of Inquiry

(1) Scope of Commission Authority Under Section 223

10. Any inquiry into the Commission's role in enforcing section 223's prohibition against messages transmitted by services like "dial-a-porn" 13/ must start with a determination of the scope of the Commission's authority to take action in the first instance against either the common carrier (here New York Telephone) or the provider of the service (here High Society) or both. In this regard, we invite comments on the various related sub-questions that arise. 14/

11. First, we invite comments on whether section 223 covers a situation where the person who places the call does not utter the offensive words but, rather, voluntarily subjects himself to hearing the words. As discussed above, New York Telephone argued that the statute does not cover such situations, while Representative Bliley argued that it does. The legislative history of section 223 focused on the need for the legislation to deter the making of harassing or obscene telephone calls to innocent victims. It did not address the issue of whether the utterer must place the call, although the oft-cited scenario in the legislative history assumed the utterer and caller were one and the same. The language of section 223(1)(A) is similarly silent as to whether the utterer of the offensive statement need be the maker of the call. As Congressman Bliley pointed out, this silence may in fact suggest that the utterer need not have placed the call, in light of the fact that subsections (1)(B), (1)(C) and (1)(D) each explicitly limit themselves to the maker of the call. Although it seems clear that a dial-a-porn type of service was not envisioned at the time section 223 was enacted, we seek comments on whether dial-a-porn nevertheless falls within the statute's ambits.

12. Second, we invite comments on whether section 223 applies to common carriers. New York Telephone is certainly not the utterer of obscene

12/ Letter from Richard Willard, Civil Division, DOJ, to Bruce Fein, General Counsel, FCC (June 10, 1983).

13/ It is the allegedly obscene nature of the recording, not the Dial-It character of the service, that is of concern to us in enforcing section 223. Non Dial-It services which provide similar kinds of recordings are equally subject to section 223, so long as interstate calls are made.

14/ Many of these questions concern issues of legal interpretation in addition to policy considerations. We feel comments on the legal issues would be helpful in this proceeding, where the legal questions do not have clear-cut answers, and note that we have on occasion sought comment on legal questions, see e.g., Notice of Proposed Rule Making in MM Docket 83-331, FCC 83-130 (May 25, 1983) at 10-11 (issue of whether Congress intended to subject cable systems to fairness doctrine as well as equal time requirements).

words, and is therefore not covered by section 223(1). Is it, however, covered by section 223(2), which covers anyone who has a telephone under his control that is being used for purposes violative of the section? Or is section 223(2) aimed only at individuals or entities who permit others to use their telephones to make obscene or harassing telephone calls? Does the recent deregulation of customer premises equipment affect a determination of whether the company controls the telephone? If section 223 does cover common carriers, how far does its coverage extend? Does it cover merely the local carrier or do long distance carriers come under subsection (2) as well?

13. Next, we ask for comments on the overall question of whether section 223, in conjunction with section 312(b), gives the Commission the power to terminate the violative conduct. The case of General Telephone Co. v. FCC, 413 F.2d 390 (D.C. Cir.), cert. denied, 396 U.S. 888 (1969), indicates that a cease and desist order under section 312(b) may be issued against a common carrier or any other entity, including High Society, because despite the fact that the section is contained in Article III of the Act, it refers to "any person." We are not certain, however, that we are authorized to issue a cease and desist order that inhibits speech — as this one would. The Supreme Court case of Freedman v. Maryland, 380 U.S. 51, 58-59 (1965), suggests that there must be some kind of assurance, by statute or regulation, that the agency would seek a prompt final judicial determination of obscenity after each such cease and desist order. See also Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 557-60 (1975); Blount v. Rizzi, 400 U.S. 410, 429 (1971). No such assurance is present, however, in either the Communications Act or the Commission's regulations. Indeed, there is nothing that would compel the Commission to seek a judicial determination promptly — or at all — following issuance of a cease and desist order. We invite comments on whether this lack of assurance precludes our authority to issue cease and desist orders against violators of section 223. We ask, additionally, whether even with an assurance of a prompt judicial finding we are authorized to issue a cease and desist order in this situation because, unlike the situation in Freedman, 380 U.S. at 59, our order would alter the status quo, not preserve it.

14. Finally, we invite comments on whether any jurisdictional problems prevent the Commission from becoming involved. Because our jurisdiction is admittedly over interstate transmissions only, must any cease and desist order be limited to interstate calls? In practice, is it technically feasible for interstate carriers (whether AT&T or a competing carrier) to block incoming interstate calls from reaching a number? If so, can the Commission take steps to require a local telephone company to limit a Dial-It service to local access only?

(2) Advisability of Commission Action

15. If we are able to conclude that the Commission possesses the authority to take action in the first instance, we must then inquire whether we have a duty to act. If not (and we think not), we inquire into the advisability of exercising such authority because of the multitude of potential practical and legal problems which could arise. We shall mention the problems that we have anticipated and invite comments on these and any others we may not have foreseen.

16. An overriding consideration is whether the Commission should place itself in a position of regulating the content of messages transmitted by telephone. To do so raises first amendment concerns, since we would be restricting the ability of persons and entities to say or hear whatever they wish over the telephone, often while in the privacy of their own homes. Would this violate the doctrine announced in Stanley v. Georgia, 394 U.S. 557, 565 (1969), that justifications that might exist in other circumstances for regulating obscenity do not reach into the privacy of one's home? We invite comments on this overall concern.

17. If we decide that some intervention is justified, a number of concerns arise. A threshhold question is whether we need only determine that a recording is "indecent" rather than obscene, as we did in the context of a radio broadcast in Pacifica Foundation, 56 FCC 2d 94 (1975). In affirming our decision in that case, the Supreme Court agreed that indecent language can be prohibited in certain contexts. FCC v. Pacifica Foundation, 438 U.S. 726 (1978). A Dial-It situation may not fall within the contours of Pacifica, however, which may be limited to broadcast, see id. at 731, 738. Moreover, in Pacifica the Court affirmed our nuisance rationale in part because the damage was already done by the time the offended listener turned to a different radio station. Id. at 748-50. (Similarly, the Court noted that the recipient of a harassing or indecent phone call can hang up, but not before the harm is done. Id.) This nuisance rationale may not apply in a Dial-It context, because individuals consent to hearing the recording in advance — by dialing the number. We seek comments on whether Pacifica nonetheless permits us to impose the lesser burden of finding indecency under section 223.

18. Whether we apply a standard of obscenity or indecency, the next concern is how we evaluate whether the material is obscene or indecent. Under Miller v. California, 413 U.S. 15, 24 (1973), obscenity is controlled by the trier of fact's determination as to "whether the average person, applying contemporary community standards would find that the . . . [material] appeals to the prurient interest." (Emphasis added.) Under Pacifica, indecency is also determined according to the local community standard, but without the element of prurient appeal. See 438 U.S. at 741; 56 FCC 2d at 99. Application of the local community standard would seem to be accomplished most easily in a jury trial, when the community standard to be applied is generally the community from which the jury is drawn, see Hamling v. United States, 418 U.S. 87, 105-06 (1974). It becomes more difficult if the proposed determiner of obscenity is a Washington federal agency — here, this Commission. Although we have made such determinations in cases like Pacifica, we ask whether we ought to limit the category of cases where we so act. If we do make such a determination, would the Commission have to admit evidence of the local community standard? Which community's standard would apply in a dial-a-porn situation? Is it the community where the statements are uttered, New York City in this instance, or a community where they are heard? Does the Commission have the discretion to choose any of these communities? Are there certain procedures that we would be required to follow in making our determination? We invite comments on these queries specifically and on the practical problems generally of determining what is obscene. More fundamentally, we invite comments on the desirability of having the Commission become an arbiter of obscenity. Specifically, we question whether this ought to be part of our function and whether it is wise or feasible to devote the amount of Commission time and resources that would be required to make the

multitude of determinations that would undoubtedly be requested. Finally, we ask whether the availability of alternative procedures (e.g., prosecutions in federal or state courts) should affect our decision.

19. Any determination of obscenity is further complicated by the question of what impact access to the recordings by children should have, if any. On the one hand, Ginsberg v. New York, 390 U.S. 629, 634, 637-38 (1968), suggests that the definition of obscenity can be modified when minors are involved, so that prurient appeal and lack of social value are assessed vis-a-vis minors. The Court stressed, however, that it was using that modified definition only to determine if a statute prohibiting the sale of certain materials to minors was lawful. Id. at 635. The materials thus remained available to adults, and hence did not violate Butler v. Michigan, 352 U.S. 380 (1957). In Butler, the Court struck down a statute which had the effect of preventing adults from having access to materials that were judged to have a potentially deleterious influence on children. Id. at 382-83. The Court explained that such a statute would have reduced the adult population to reading only what is fit for children. Id. at 383. This result was carefully avoided by the Court in Pacifica, supra, 438 U.S. at 750 n.28, which noted that the obscene radio broadcast at issue might be permissible if broadcast in late evening rather than afternoon. In the dial-a-porn context, should obscenity be determined according to the standard of an adult or a child? Is the mere fact that children can call the number sufficient to impose a child's standard? Would a total ban, based on such a standard, reduce the level of what adults can hear to what is fit for a child? Should the ability or inability of parents to control their children's access to the recordings have any impact? Generally, what effect should access of children to the recordings have on our determination?

20. Other concerns stem from the first amendment implications that necessarily arise whenever speech is restrained. Of paramount consideration is whether, if we were to issue a cease and desist order, such an order would have to be limited in scope so as not to become an unlawful prior restraint. If so, how limited would that scope have to be? A ban against all future utterings of statements, based on a finding that statements previously made were in violation of section 223, would no doubt run afoul of the Supreme Court's ban on prior restraints, as delineated in such cases as Near v. Minnesota, 283 U.S. 697 (1931). An order banning only one particular recording would seem least likely to run into constitutional problems, but would also be inefficacious. Would a cease and desist order that only prohibits future use of the telephone for statements in violation of section 223 be lawful? If directed at High Society, would such an order prevent High Society from offering its service at all? Any cease and desist order imposed by the Commission would, of necessity, be based on a determination that particular recordings were obscene. This determination, moreover, would likely be made according to only one local community standard, e.g., that of the listener. Nonetheless, the resulting cease and desist order could conceivably prevent High Society from providing its service to the country at large if High Society did not want to risk violating the cease and desist order. High Society could not be certain that the recordings would not also be considered obscene in other jurisdictions and that their transmission therein would not violate the cease and desist order. Moreover, even if High Society was not concerned with other communities, it could not be certain that, if it continued to operate its service, a call would not be received

from the particular community whose standard had been applied, thereby violating the order. Accordingly, would a cease and desist order operate as a de facto prior restraint? Are other constitutional problems, e.g., equal protection or due process, thereby implicated? We invite comments on whether these are justifiable concerns and seek proposed solutions.

21. Special problems could occur if section 223 applies to common carriers because of the special duty of a common carrier to serve all parties indifferently, pursuant to 47 U.S.C. § 201(a). See also National Association of Regulatory Utility Commissioners v. FCC, 533 F.2d 601, 608-09 (D.C. Cir. 1976). Can a common carrier comply with both section 201, which requires the carrier to serve all parties indifferently and hence by implication without regard to content, and section 223, which (if it applies to common carriers) prohibits the carrier from permitting a customer to transmit obscene messages? Do these two sections impose conflicting duties on a carrier? Does a carrier like New York Telephone have either the obligation or discretion to stop obscene transmissions? Does it make a difference if an applicable tariff prohibits obscene language? Does it make a difference whether the Commission or a court has made a prior finding of obscenity? Although nothing suggests that a carrier has a duty to knowingly transmit messages which it has reason to believe are made in the furtherance of a crime (and, indeed, a carrier would conceivably be guilty of aiding and abetting the crime if it did so), how would the carrier know the materials were obscene if there had been no adjudication of obscenity? Should the carrier make the determination? If it did so, suspended service and then a court ruled that the materials were not obscene, would the carrier have subjected itself to liability for not carrying the message? Even if a judicial or administrative finding of obscenity has been made, what does New York Telephone do if High Society claims to have "softened" its recordings so that they are no longer obscene? Will New York Telephone and other carriers resort, both in this last hypothetical and when they first become aware that a dial-a-porn type of service is being offered (thereby subjecting themselves to potential liability under section 223), to filing motions for declaratory rulings as to whether the recordings at issue are obscene? If so, it would seem that the Commission would thereby be thrust into the role of arbiter of obscenity, and all of the potential problems inherent in that role (as described above) would be thrust upon us. We are concerned, moreover, that we would be inundated with such requests if in fact common carriers were placed in this potentially conflicting position. We invite comments and suggested solutions to this dilemma.

ISSUE 2: Ability of Common Carriers to Unilaterally Enforce Prohibitions Against Obscene Transmissions

A. Background

22. We move now to the second major issue in this inquiry: whether common carriers may unilaterally determine that materials are obscene and exclude those materials or terminate service under color of statute, tariff or contract. The distinguishing characteristic of a common carrier is that it is a pipeline service, and, therefore, has a duty to transmit all messages without regard to their content. Commission rules reiterate this duty. For example, 47 C.F.R. § 21.903(b)(1) requires that multipoint distribution

service stations not be "substantially involved in the production of, the writing of, or the influencing of the content of any information to be transmitted over the facilities." At the same time, however, a carrier may have a tariff or contract prohibiting the use of the common carrier's facilities for the transmission of obscene materials. This portion of this inquiry focuses on the enforceability of such a contract or tariff provision. The Multipoint matter before the Commission is a case in point.

B. History Of Multipoint Dilemma

23. On June 14, 1983, Multipoint Distribution Systems, Inc. ("Multipoint") filed a petition for a declaratory ruling pursuant to 47 C.F.R. § 1.2. Specifically, Multipoint seeks a ruling that section 21.903(b)(1) of the Commission's rules "does not preclude a multipoint distribution service station from refusing to transmit consumer supplied programming which the licensee reasonably determines to be obscene, profane or indecent." 15/ Multipoint is the licensee of MDS station WJN-80 in San Antonio, Texas. One of the services provided by WJN-80 is the distribution of movies to customers of San Antonio Home Entertainment, Inc. Multipoint has a contract with Home Entertainment specifying the terms and conditions of service. 16/ One of the contract provisions specifies that Home Entertainment will not broadcast X-rated or unrated movies or other material that is obscene, indecent or profane under 18 U.S.C. § 1464.

24. Multipoint alleges that Home Entertainment has, however, been distributing unrated movies which are, by Home Entertainment's description, soft-X versions of hard core X-rated films. Multipoint informed Home Entertainment that this was a breach of contract and that service would be terminated. Home Entertainment countered by contending that the contract is unenforceable in that it permits Multipoint, as a common carrier, to interfere with Home Entertainment's control over programming content, in violation of the Commission's rules. Home Entertainment also asserted that its movies were not obscene, profane or indecent. Multipoint now asks the Commission to sanction its proposed termination of service to WJN-80 because of the alleged breach of contract. On July 1, 1983, the Commission issued a public notice of the request. Accordingly, any comments received in that proceeding will also be considered in this one.

C. Areas of Inquiry

25. Notably, Multipoint did not ask the Commission to sanction its determination that the movies were obscene. If it had, all the problems highlighted in paragraphs 10-20, supra, would arise. Instead, a different set of questions is presented, viz.: Is it appropriate for a common carrier to determine what is obscene and what is not? Can a common carrier, in executing a contract, refuse to carry materials which are not obscene under the Supreme

15/ Petition for Declaratory Ruling, File CCB DFD 83-2 (June 14, 1983) at 1.

16/ Multipoint provides its service pursuant to contract rather than tariff because no interstate service is involved. Id. at 1-2.

Court's standard? If a carrier makes its own determination of obscenity, is it subject to liability if a court later determines the materials were not obscene?

26. A fundamental issue is whether a common carrier can control obscenity without violating the Commission's rules against a common carrier's control over content. If section 223 of the Act applies to common carriers, then the answer is presumably yes. If so, and we seek comments on whether this is in fact so, the next question is whether the carrier can make its own determination of obscenity.

27. A further issue is whether the answer should be the same for telephone carriers and MDS licensees. Perhaps it should be concluded that a telephone carrier has neither the obligation nor power to proscribe obscene statements, but that an MDS licensee does. We seek reasons why this should or should not be so. Is the Multipoint scenario different conceptually from a telephone carrier monitoring and suspending telephone service upon making its own determination of obscenity?

28. In its petition, Multipoint suggests that perhaps the most analogous form of service to MDS is the leased access channel provided by cable systems. 17/ In 1976, the Commission tried to extend its prohibition against obscene programming by original cablecasters to leased access channels. 18/ The Supreme Court overturned this attempt, on the ground that the Commission did not have the authority to impose common carrier rules on CATV systems while exercising jurisdiction on the ground that their activities are ancillary to broadcasting. 19/ Because MDS licensees are regulated as common carriers, is there no impediment to subjecting MDS licensees to such a rule? What bearing, if any, does this have on an MDS licensee's ability to impose such a rule by contract?

Procedural Matters

29. In addition to the matters specifically addressed in this Notice, any other comments related to the Commission's enforcement of prohibitions against the use of common carrier facilities for the transmission of obscene materials, which have not been covered by questions herein, are welcome.

30. The Commission adopts this Notice of Inquiry under the authority contained in Sections 4(i) and 403 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 403. Pursuant to the procedures set forth in Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415,

17/ Id. at 6.

18/ See Report and Order in Docket 20508, 59 FCC 2d 294 (1976); Clarification of Section 76.256 of the Commission's Rules and Regulations, 59 FCC 2d 984 (1976), rev'd, FCC v. Midwest Video Corp., 440 U.S. 689 (1970).

19/ FCC v. Midwest Video Corp. 440 U.S. 689 (1979).

interested persons may file comments on or before *December 12*, 1983, and reply comments on or before *January 26* , 1984. All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information, or a writing indicating the nature and source of such information, is placed in the public file and provided further that the fact of the Commission's reliance on such information is noted in the Report and Order.

31. In accordance with the provisions of Section 1.419 of the Commission's Rules, 47 C.F.R. § 1.419, formal participants shall file an original and five copies of their comments and other materials. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 11 copies. Members of the general public who wish to express their interest by participating informally may do so by submitting one copy. All comments are given the same consideration, regardless of the number of copies submitted. All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C.

32. For further information regarding this matter, contact Diane L. Silberstein at (202) 632-2587.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary